

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Implementation of Section 11 of the	)	
Cable Television Consumer Protection	)	CS Docket No. 98-82
and Competition Act of 1992	)	
	)	
Implementation of Cable Act Reform	)	
Provisions of the Telecommunications	)	CS Docket No. 96-85
Act of 1996	)	
	)	
The Commission's Horizontal and	)	MM Docket No. 92-264
Vertical Ownership and Attribution Rules	)	
	)	
Review of the Commission's Regulations	)	
Governing Attribution of Broadcast and	)	MM Docket No. 94-150
Cable/MDS Interests	)	
	)	
Review of the Commission's Regulations	)	
and Policies Affecting Investment in the	)	MM Docket No. 92-51
Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 97-154
Cross-Interest Policy	)	

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**COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast") hereby responds to the Commission's request for comment on issues relating to ownership of cable systems. As one of the nation's largest and fastest growing operators of cable systems, now providing cable and broadband services to 8.5 million customers in 26 states, Comcast has demonstrated its desire and its ability to continue to expand its business, through both internal growth and acquisitions. Comcast therefore has a direct interest in the outcome of this proceeding

and a corresponding desire to assist the Commission in thinking through the issues raised in the Further Notice of Proposed Rulemaking.<sup>1</sup>

As the Commission is aware from the merger agreement announced December 20, 2001,<sup>2</sup> Comcast's business interests would be most immediately implicated by rules that would constrain its ability to grow *horizontally*, i.e., by adding cable subscribers. These initial comments therefore focus only on that topic. It is our hope that a full understanding of certain fundamental legal and factual propositions will greatly simplify the Commission's decision-making process, and we offer our analysis to that end.

### INTRODUCTION AND SUMMARY

At the core of this proceeding is a single question: are nationwide ownership limits on cable systems needed now and, if so, to what extent? That question, in turn, raises several others: What are the objectives of the applicable statutory provision? What constraints have judicial decisions placed on the Commission's implementation of the statute? What are the current marketplace facts the Commission must consider in deciding what horizontal ownership constraint, if any, is needed?

As explained below, the *statutory objective* of the horizontal ownership provision of the Cable Act of 1992<sup>3</sup> is to ensure that the horizontal scale of a cable operator does not jeopardize the ability of consumers to access an abundance of video programming. *Judicial decisions* make plain that any rules adopted for that purpose must be tailored to

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<sup>1</sup> FCC 01-263 (rel. Sept. 21, 2001) ("Further Notice" or "FNPRM").

<sup>2</sup> Comcast and AT&T will in due course file the application necessary to effectuate the merger of their cable and certain other assets. That application will address the issues necessary for a Commission decision under sections 214 and 310 of the Communications Act. The current comments, by contrast, focus solely on the Commission's implementation of its rulemaking authority under the ownership provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act"), Pub. L. 102-385, 106 Stat. 1460, codified at scattered sections of 47 U.S.C.

<sup>3</sup> The horizontal ownership provision is in Section 11(c) of the 1992 Act and is codified at 47 U.S.C. § 533(f).

address concrete, nonconjectural risks, if any, presented in a competitive market environment that is markedly different from the one that existed at the time of the 1992 Act. An accurate understanding of *current market conditions* demonstrates that viewers currently enjoy access to an unprecedented mix of program choices and that there is no shortage of outlets through which video programming can “flow” to consumers, independent of programming judgments made by cable operators.

Before discussing these matters in detail, it may be helpful to present an overview of Comcast’s views on each of these subjects and to introduce an insight regarding the market definitions proposed in the Notice.

*Statutory objective:* Adoption of any horizontal ownership rule must be grounded in the concerns that impelled Congress to empower the Commission to adopt one. The primary intended beneficiary of the legislation is obviously the American consumer, and the consumer interest Congress sought to promote was the opportunity to choose from a competitive supply of video programming. Accordingly, while it is useful to understand the various commercial relationships involved in bringing video programming to the consumer, the Commission must never lose focus on the main issue: preventing unfair impediments to the flow of video programming to consumers.

Moreover, to the extent that the flow of video programming to consumers is perceived to be in any jeopardy, it is essential to identify, with particularity, the precise nature of the problem. The Commission must consider not only horizontal ownership limits but also other statutory and regulatory tools that are available – and then carefully choose only the tool needed to achieve concrete, demonstrable objectives.

*Judicial constraints:* The courts have curtailed the Commission’s discretion in implementing horizontal ownership constraints. Cable operators’ First Amendment freedoms of speech and press are at stake. Accordingly, although the statute is facially valid, the Commission may constrain the horizontal expansion of a cable company only

to the extent necessary to prevent genuine risk of harm to viewers' interests in accessing an abundance of programming, not for miscellaneous other purposes. Further, any assessment of risks to those viewers' interests must be grounded in the record and an accurate understanding of current marketplace conditions, not invocations of a less competitive environment that has long since ceased to exist.

*Marketplace realities:* The means by which consumers access video programming have changed dramatically since the 1992 Act. Today, there is simply no basis for concern that viewers can be confined to a limited menu of video programming choices, controlled by a single "gatekeeper." Consumers now have ready access to a rich array of video programming choices that could scarcely have been imagined in 1992. Many of those choices are completely independent of cable operators' control; others are largely so. The continuing abundance of video programming choices is a direct result of a vibrant, dynamic, and competitive marketplace.

Ten years ago, when Congress was finishing work on the 1992 Act, cable had just completed a rapid period of growth and was becoming a primary vehicle for the transmission of video programming. At that time, capacity of cable systems was generally limited to three dozen channels, cable operators unilaterally decided which signals they would carry (mandatory carriage of local broadcast signals had not yet been ensured by statute), vertical integration between cable operators and creators and aggregators of video programming had been increasing, and competition among what have now come to be called multichannel video programming distributors ("MVPDs") had scarcely begun.

Today, the world is radically different. Channel capacity of cable systems has increased to an average of 80 analog channels, and soared to more than 200 channels where digital video has been deployed. Must-carry and retransmission consent statutes have vastly strengthened the bargaining power of local broadcasters, not only for carriage

of their broadcast stations, but also for carriage of their affiliated “cable networks.” Seven national broadcast networks are assured ubiquitous carriage on cable systems, and as a practical matter so are scores of other channels – many (but not all) of which are affiliated with owners of broadcast networks. The number of video programming networks has grown steadily over the years, and the degree to which those networks are vertically integrated with cable operators has declined year after year. MVPD competition is now robust and widespread, particularly with two separate, facilities-based DBS competitors that each possess a multi-hundred-channel, all-digital platform and a nationwide reach.

*Market Definitions:* The Further Notice postulates that the flow of video programming involves three distinct markets: (1) the *creation* of programming, (e.g., by producers of individual programs or series) (2) the *aggregation* (or packaging) of programming (e.g., by networks), and (3) the *distribution* (or delivery) of programming to viewers (e.g., by MVPDs). While this model is generally accurate when viewed from the perspective of, say, advertisers or equipment suppliers, the model has certain limitations for purposes of the analysis required in this proceeding.

For one thing, it is important to understand that many entities do not confine their activities to a single one of these “markets.” Indeed, a local broadcaster commonly creates its own local programs (Market 1), aggregates that content with network feeds, syndicated programs, and other selected programming (Market 2), and delivers it directly to the consumer via the licensed use of VHF or UHF television spectrum (Market 3), as well as via other delivery media like cable or DBS (Market 3 again). Comcast likewise operates in Markets 1, 2, and 3. In addition to its activities as a provider of cable services (Market 3) and its interests in cable networks such as QVC, E!, style, and The Golf Channel (Market 2), Comcast creates local programming through its award-winning cn8 (Market 1), which serves customers in New Jersey, Pennsylvania, and Maryland, and

Comcast SportsNet, which operates separate entities serving the Philadelphia and Washington/Baltimore areas. Comcast also creates concert and special event programs, as well as numerous community service interstitials in many of its markets, which are aired during the five minutes of each half-hour that Comcast programs for the “local editions” of CNN Headline News (Market 1 again).

More importantly, the model does not fully capture how relationships among industry participants affect the flow of video programming to consumers. A key insight that is not reflected in the Further Notice is that decisions by aggregators of programming (Market 2) can in many cases *ensure* the availability of programming to viewers, *independent* of the wishes of an entity that delivers video programming to consumers (Market 3). Specifically, to the extent that a creator of video programming (Market 1) succeeds in selling its programming to any one of seven broadcast networks (ABC, NBC, CBS, PBS, Fox, WB, or UPN) (Market 2), or any one of several dozen “must-have” cable networks (e.g., Discovery, ESPN, Lifetime) (also Market 2), that programming is virtually certain to be available to vast numbers of viewers, including delivery by over-the-air broadcast, cable and satellite platforms (Market 3).

In other words, from the standpoint of the consumer (whose interest is in video programming, not “networks” or “delivery media”), Markets 2 and 3 generally collapse into a single market. This has powerful implications for an assessment of the ability of a cable operator to interfere with the “flow” of programming (Market 1) to consumers. These implications will need to be taken into account in any decision regarding the creation of new horizontal ownership limits.

*Changes in the Nature of the Cable Business:* Finally, any assessment of new cable ownership rules must take into account profound changes in the evolution of the cable business. At the time of the 1992 Act, cable had a single consumer offering: delivering analog video programming. Today, after tens of billions of dollars of

investment, and with the explicit encouragement of Congress and the Commission, the cable business has been transformed. Digital video has been added, with electronic program guides; competitive high-speed Internet service is being rolled out with great success; video-on-demand and other interactive capabilities are becoming available; and additional capabilities of the broadband platform (including much-desired competition in residential telephone services) are also being mined. Cable's competitors are likewise pursuing this "broadband migration," as Chairman Powell has christened it. In this environment, scale and scope economies take on a new significance that must be considered in formulating ownership rules.

**I. CONGRESS AUTHORIZED HORIZONTAL OWNERSHIP LIMITS ONLY TO THE EXTENT NEEDED TO PREVENT UNFAIR IMPEDIMENTS IN THE FLOW OF VIDEO PROGRAMMING TO CONSUMERS.**

**A. The 1992 Act Should Be Construed as a Multi-Faceted Effort To Promote the Interests of Consumers, with the Explicit Hope that Competition Would Replace Regulation as the Means of Protecting Those Interests.**

Congress had a number of objectives in passing the 1992 Act, but all of them centered on serving the needs of the American public. Having assessed the rapid evolution of the cable industry over the years since the Cable Act of 1984, Congress recognized that the industry had brought significant benefits to consumers through the construction of an infrastructure that increased the number of channels of video programming available to consumers, as well as through the development of new programs and networks.<sup>4</sup> But Congress also perceived certain circumstances and trends that it feared were not consistent with consumers' interests.<sup>5</sup> It therefore enacted a statute

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<sup>4</sup> S. Rep. No. 102-92 ("1992 Senate Report"), at 3, reprinted in 1992 U.S.C.C.A.N. 1133, 1135 (citing growth in cable availability, customers, channel capacity, and programming choices).

<sup>5</sup> Cable Act of 1992, § 2.

that sought both to preserve and continue the salutary developments that had occurred over the 1980s and early 1990s and also to create conditions that would serve consumers even better in years to come.

Whether one thinks in terms of “viewers” or “consumers” or “the American public,” and whether one agrees or disagrees with some of the judgments Congress made at the time, it is clear that Congress’s main goal in the 1992 Act was to serve the public interest. The aim of benefiting consumers is pervasively reflected in the text of the 1992 Act and its legislative history.<sup>6</sup> So, a statutory reading that centers on the interests of consumers is essential.<sup>7</sup>

The statute must also be interpreted in light of Congress’s understanding that competition is preferable to regulation as a means of safeguarding consumers’ interests. Congress was explicit on this point. The 1992 Act and its legislative history clearly attribute various perceived problems to the absence of competition in multichannel video programming distribution and explain that various statutory and regulatory remedies were adopted either to promote that competition or to protect consumers in the time before competition became established.<sup>8</sup> Accordingly, the discretion granted the Commission in the 1992 Act must now be exercised with a restraint commensurate with the explosive growth of competition that has occurred during the past decade.

Finally, the 1992 Act should be understood as somewhat unusual in that, for certain perceived problems, it offered more than one solution. Congress was not entirely

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<sup>6</sup> See, e.g., 138 Cong. Rec. S759 (daily ed. January 31, 1992) (statement of Sen. Kerry) (“[We] must keep our eye on the ball. And the ball, in this case, is the well-being of American video consumers, the viewers all across the nation”).

<sup>7</sup> Consistent with this, FCC Chairman Powell has observed, “Everything we do is about consumers . . . . [M]aximizing consumer welfare is the paramount objective of public policy.” Remarks by Michael K. Powell before the Federal Communications Bar Ass’n (June 21, 2001), available at <http://www.fcc.gov/Speeches/Powell/2001/spmkp106.html>.

<sup>8</sup> Cable Act of 1992, § 2(a)(2) & (b)(1)-(5).

sure just how the market would evolve, or precisely what measures would be needed to protect consumers. Accordingly, it tried to provide the Commission with a complete “regulatory toolkit” to address certain perceived problems. But implicit in this approach is a corresponding responsibility on the part of the Commission to be selective in the tools it uses.

**B. The Sole Purpose of the Ownership Provision Is To Promote Viewers’ Access to Video Programming.**

As noted, the 1992 Act had many facets. No one provision was intended to cure all manner of perceived ills. Rather, Congress had numerous independent concerns (e.g., prices for cable services, carriage of local television broadcast signals, program access) and enacted a number of distinct provisions to address them.<sup>9</sup> It also expressly contemplated that the need for these various provisions would diminish as competition developed.<sup>10</sup>

Horizontal cable ownership rules were authorized for a discrete and specific purpose. That goal was to ensure that the “flow of video programming from the video programmer to the consumer” would not be “unfairly impede[d].”<sup>11</sup>

More precisely, Congress was concerned, in 1992, that the then-existing conditions of the market – the level of minimal competition among MVPDs, a growing array of ownership relationships between cable networks and cable operators, and

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<sup>9</sup> See, e.g., 47 U.S.C. §§ 533 (ownership), 534 (carriage of local television signals), 548 (development of competition and diversity in video programming distribution). The exclusivity provision of the program access section is scheduled to sunset in October 2002. See 47 U.S.C. § 548(c)(5)

<sup>10</sup> See *id.*

<sup>11</sup> 47 U.S.C. § 533(f)(2)(A). See also Cable Act of 1992, § 2(a)(4) (focusing on “the number of media voices available to consumers”). Thus, from the outset, the interests that are paramount are those of the consumer – not those of the video programming packager or distributor. This is a critical point in the analysis of the need for and extent of any rule. See *infra* section I(C), text accompanying notes 14-18.

constrained channel capacity – held the potential to negatively affect the flow of video programming to consumers. It therefore gave the Commission several powers to address these issues, not knowing for sure which (if any) of these powers would prove to be needed, especially over time.

Three of these powers are found in 47 U.S.C. § 533(f)(1):

- Paragraph (A), the horizontal ownership provision, directs the Commission “to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.”
- Paragraph (B), the vertical ownership provision, directs the Commission “to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.”
- Paragraph 533(C) also relates to vertical relationships; it permits the Commission “to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of programming.”

The Commission has previously adopted rules under Paragraphs (A) and (B) and is reviewing those rules in this proceeding. The Commission has not previously adopted rules under the authority of Paragraph (C) and is not proposing to do so here.

In any event, section 533(f)(2) contains seven separate objectives for the Commission to consider in implementing the rules authorized by any one of the three provisions of section 533(f)(1) – which, as noted above, included two vertical provisions as well as a horizontal provision. Two of these objectives focus on the “flow” of video programming and establish the goal of ensuring that it is not “unfairly impede[d]” or “unreasonably restrict[ed].”<sup>12</sup> That goal was not to be considered in a vacuum; rather, the

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<sup>12</sup> It bears emphasis that the statute focuses directly on “video programming” (Market 1) and not video programming packagers (Market 2) or distributors (Market 3). 47 U.S.C. § 533(f)(2)(A). “[V]ideo programming” means “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20).

Commission was directed to pursue it in a manner that was consistent with several other enumerated objectives as well as other unspecified “public interest objectives.” The specific guidance that Congress felt it necessary to spell out included admonitions to:

- “take particular account of the market structure, ownership patterns, and other relationships of the cable industry” (§ 533(f)(2)(C));
- consider “efficiencies and other benefits that might be gained through increased ownership or control” (§ 533(f)(2)(D));
- recognize the “dynamic nature of the communications marketplace” (§ 533(f)(2)(E));
- avoid constraining cable operators from providing service to unserved rural areas (§ 533(f)(2)(F)); and
- refrain from “impos[ing] limitations which would impair the development of diverse and high quality video programming” (§ 533(f)(2)(G)).

In short, the Commission was directed to take account of a variety of factors in assessing the need for ownership rules. But the paramount objective was clearly to safeguard consumers’ access to video programming – and to prevent the “flow” of that programming from being unfairly impeded by various ownership interests. It follows, therefore, that horizontal ownership limits may only be adopted to the extent necessary to ensure that the flow of video programming to consumers is not unfairly impeded given current marketplace conditions.<sup>13</sup>

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<sup>13</sup> Contrary to the suggestion in the FNPRM, the Commission has no discretion to base a horizontal ownership limit on other factors, such as increased convenience to local franchising authorities. Compare FNPRM at ¶ 32 (suggesting “that the existence of multiple MSOs provides local franchising authorities with alternatives at least as a means to compare the performance of the incumbent against other operators, referred to in the literature as ‘benchmarking’”). Whether or not this is plausible, it has nothing to do with the 1992 Act. There is nothing in the language of the statute, or in the legislative history, that suggests Congress had any interest in constraining ownership so as to facilitate benchmarking. The statutory purpose is to safeguard the flow of video programming to consumers against unfair impediments.

**C. The Statute Does Not Contemplate Adoption of Rules Intended To Guarantee Success for Every Producer of Video Programming.**

The 1992 Act does not “guarantee success” for any producer of video programming, nor can any Commission rule do so. Rather, the statutory provision must be read to ensure a “fair opportunity” for video programming to reach consumers. Cable operators are not common carriers. They are entitled to make judgments about quality, distinctiveness, customer preferences, community needs and sensitivities, and myriad other factors. Indeed, cable customers count on their cable operators to make these judgments. Cable ownership rules must account for this important editorial function.

Moreover, a “fair” opportunity cannot mean “guaranteed” access because there will always be more programs than available outlets and because, for some programs, there may be no consumer demand. No national ownership rule could guarantee success for everyone who may wish to produce video programming (nor for those who aggregate it or distribute it either).<sup>14</sup> The 1992 Act instructs that cable ownership rules must *not* “impair the development of diverse and high quality video programming.”<sup>15</sup> The statute did not contemplate 281 cable program networks,<sup>16</sup> and it clearly does not guarantee that, given 281 alternatives, government must force the market to make room for number 282.

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<sup>14</sup> Even on a common carrier platform, there is no way to ensure that every would-be programmer would be successful. There will always be more programmers seeking access than can be accommodated, no matter how large the channel capacity, and some programs that can never attract enough viewers to be economically successful. Only in Lake Wobegon can everyone be above average.

<sup>15</sup> 47 U.S.C. § 533(f)(2)(G).

<sup>16</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 16 FCC Rcd 6005, 6077 ¶ 173 (2001) (“Seventh Annual Video Competition Report”) (“In 2000, there were 281 satellite delivered national programming networks”).

The decision as to whether 281+ “n” alternatives is better or worse than 281 is expressly left to “fair competition.”<sup>17</sup>

“Fair” access, then, must be given a construction that takes into account the editorial (and other) functions of program aggregators (Market 2) and program distributors (Market 3) and the inevitability that not every program will find a path to consumers’ homes. So understood, fair access should mean, as the Commission recognizes,<sup>18</sup> that no cable operator (Market 3) should have the unilateral power, by making a decision not to carry certain video programming (Market 1), to prevent that program from reaching the critical mass of viewers necessary to support programming of that type or genre. Put another way, so long as the creator of a program (Market 1) enjoys access to outlets (in both Markets 2 and 3) whose ability to reach consumers is independent of the program carriage decisions of a particular cable operator, the statutory objective is fulfilled.

## **II. JUDICIAL DECISIONS CONSTRAIN THE COMMISSION’S EXERCISE OF ITS POWER TO ESTABLISH HORIZONTAL OWNERSHIP RULES.**

Apart from the limits that are apparent on the face of the statute, the Commission’s power to establish horizontal ownership rules has also been restricted by judicial decisions. The primary limit on the Commission’s power is constitutional. As

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<sup>17</sup> A further complication with an approach that seeks to guarantee success is that the costs associated with different kinds of video programming vary markedly, which translates directly into differences in the size of the audience needed to achieve viability. See generally John Higgins, *It’s All Relative; Small Ratings Sometimes Mean Big Success*, *Broadcasting & Cable*, Nov. 19, 2001, at 16 (show with 500,000 viewers “would mark a dismal failure over at TNT” but represents “a giant breakout hit that transformed Food Network”). Certainly, the courts have not sanctioned a regulatory approach that guarantees access for every additional video programming “voice.” See *infra*.

<sup>18</sup> See FNPRM at ¶ 28.

the courts have found many times, cable operators enjoy First Amendment freedoms of speech and of the press.

As a result, any rule that limits the number of viewers to whom a cable operator may “speak” must be narrowly tailored to achieve a legitimate government objective. Moreover, the courts have examined the horizontal ownership provision of the 1992 Act and the Commission’s rules adopted thereunder and provided specific guidance that must be followed in establishing any new horizontal ownership constraint.

**A. Restrictions on Cable Operators’ Horizontal Growth Must Be Reasonably Tailored to a Legitimate Government Objective.**

Cable operators provide original programming and exercise editorial discretion over the programming they distribute.<sup>19</sup> Because they engage in and transmit speech, they are entitled to the speech and press protections of the First Amendment.<sup>20</sup>

*Turner I* rejects the notion that cable operators may necessarily be subject to the kinds of regulations that may lawfully be imposed on broadcasters.<sup>21</sup> It makes clear that restrictions on speech, even when they qualify for intermediate rather than strict scrutiny,<sup>22</sup> cannot be justified on the basis of hypothetical concerns; rather, the Commission “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>23</sup> *Turner II* illustrates that only the barest majority of the Supreme Court was willing to affirm an explicit congressional constraint on cable operators’ speech and press freedoms,

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<sup>19</sup> See Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

<sup>20</sup> See, e.g., Leathers v. Medlock, 499 U.S. 439, 444 (1991); Turner Broadcasting System, Inc. v. United States, 512 U.S. 622, 636 (1994) (“Turner I”); Turner Broadcasting System, Inc. v. United States, 520 U.S. 180 (1997) (“Turner II”).

<sup>21</sup> Turner I, 512 U.S. at 639-640.

<sup>22</sup> See United States v. O’Brien, 391 U.S. 367 (1968).

<sup>23</sup> Turner I, 512 U.S. at 664 (plurality).

and even then only because of a unique and unlikely-ever-to-be-repeated combination of factors.<sup>24</sup>

These cases teach that the Commission must be careful in adopting any regulations that constrain the constitutional free speech and free press rights of cable operators. At a minimum, any rules must serve a legitimate government objective and be reasonably tailored to that end.

**B. Ownership Rules Must Be Grounded in Demonstrable Risks of Harm to Consumers.**

The skepticism with which courts now view constraints on cable operators' First Amendment freedoms has already been demonstrated in litigation over the horizontal ownership limits that the Commission previously adopted.<sup>25</sup> While *Time Warner I* upheld the facial constitutionality of the horizontal ownership provision of the 1992 Act, *Time Warner II* shows that specific FCC rules that constrain cable operators will be carefully reviewed to ensure that they are solidly grounded in current market conditions and not addressed to "conjectural" harms.

In particular, the D.C. Circuit has made plain the Commission's burden to demonstrate that any ownership rules are supported by "substantial evidence."<sup>26</sup> That is, the Commission must "show a record that validates [its proposed] regulations, not just the

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<sup>24</sup> Turner II, 520 U.S. at 187, 195-214.

<sup>25</sup> See Time Warner Entertainment Co., L.P. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) ("Time Warner I"); Time Warner Entertainment Co., L.P. v. Federal Communications Commission, 240 F.3d 1126 (D.C. Cir. 2001) ("Time Warner II").

<sup>26</sup> The Commission must justify any limits it imposes as reasonable in light of record evidence that shows "the recited harms are real, not merely conjectural." Time Warner II, 240 F.3d at 1130. See also Arizona Pub. Serv. Co. v. United States, 742 F.2d 644, 649 (D.C. Cir. 1984) ("Mere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decisionmaking"); James L. Melcher v. Federal Communications Commission, 134 F.3d 1143, 1152 (D.C. Cir. 1998) (under the "substantial evidence" test, the Commission's conclusions must be rationally connected to the facts in the record).

abstract statutory authority.”<sup>27</sup> Any rules the Commission adopts must demonstrably “promote the interrelated interests of . . . diversity in ideas and speech [and] competition.”<sup>28</sup> Such rules must be narrowly tailored to address harms that are “real, not merely conjectural.”<sup>29</sup>

Judicial review has also underscored the proposition that the interests to be protected by any ownership rules are those of the American public, not those of particular industry participants. The constitutional basis for any restriction on cable operators’ ownership interests lies in “ensuring *public* access to ‘a multiplicity of information sources.’”<sup>30</sup> Importantly, the D.C. Circuit most assuredly *did not* conclude that ownership rules should guarantee the success of new programming (Market 1),<sup>31</sup> nor did it assume (or suggest) a need for the Commission to try to allocate profits between aggregators (Market 2) and distributors (Market 3). Instead, the court found that the public interest in diversity would be fulfilled when program creator (Market 1) has “at least two conduits through which it can reach the number of viewers needed for viability.”<sup>32</sup> In fact, this is the absolute limit on “diversity” as a justification for horizontal ownership restrictions.<sup>33</sup>

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<sup>27</sup> Time Warner II, 240 F.3d at 1130.

<sup>28</sup> Id. (citing Time Warner I).

<sup>29</sup> Id.

<sup>30</sup> Id. at 1131 (emphasis added), quoting Turner II.

<sup>31</sup> See Time Warner II, 240 F.3d at 1130-32 (discussion of “open fields” approach assumes for present purposes the validity of Commission’s goal of preventing cable operators “from precluding the entry into the market of a new cable programmer”). The Court’s refusal to explicitly endorse such an approach speaks volumes. Moreover, even “[a]ssuming the validity of [such] premises,” the Court found they would only support a limit of 60% on a single operator. Id. at 1132.

<sup>32</sup> Id. at 1131.

<sup>33</sup> See id. at 1135 (the Commission does not have the authority to impose “solely on the basis of the ‘diversity’ precept a limit that does more than guarantee a programmer two

Moreover, the Court made clear that any rules proposed by the Commission must take account of “the substantial changes in the cable industry since . . . 1999.”<sup>34</sup> To demonstrate that such rules are properly grounded, the Commission must take a dynamic view of the market. It cannot rely on a snapshot of current market shares, but must account for the “*availability* of competition,” including DBS, and the growth (and potential for further growth) of all of cable’s competitors.<sup>35</sup> Thus, it is now manifestly apparent that cable regulations based on a decade-old mind-set and decade-old facts – as some parties persistently advocate, in a variety of proceedings – would be subject to the most skeptical scrutiny.

**III. ENORMOUS CHANGES IN THE MARKETPLACE NOW ENSURE THAT CONSUMERS CAN OBTAIN ACCESS TO AN ABUNDANCE OF VIDEO PROGRAMMING.**

There have been enormous changes in the markets for program aggregation (Market 2) and program distribution (Market 3) over the years since passage of the 1992 Act. These changes vastly expand the options open to creators of video programming (Market 1) and, more importantly, safeguard the interests of consumers in securing access to rich menus of programs from which to choose. The two main drivers of change are intense competition and unbridled technological innovation.

There are now numerous pathways to carry video programming directly into viewers’ homes, including cable, DBS, overbuilders, and television broadcasters. In 1992, consumers typically had access to a single MVPD; now, the vast majority of consumers can choose from at least three independent, facilities-based MVPDs.

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possible outlets . . .”). Of course, as our marketplace analysis demonstrates, a “Market 1” program creator has a multiplicity of outlets in today’s environment.

<sup>34</sup> Id. at 1134.

<sup>35</sup> Id. (emphasis in original).

Spurred by competition, technological innovation has also dramatically changed the marketplace. Channel capacity on MVPD platforms has greatly increased, thereby enabling vast amounts of video programming to flow to consumers.

A clear-eyed assessment of current marketplace conditions demonstrates that the horizontal scale of a cable operator is at most only minimally relevant to what video programming choices are available to consumers. Abundance and diversity are here today. Current trends portend an environment of even greater choice for consumers.

**A. In Light of Current Marketplace Circumstances, Cable Operators Cannot Impede the Flow of Video Programming to Consumers.**

Today, a creator of video programming can sell its wares in a robustly competitive marketplace. Video programming is purchased not just by cable operators and DBS providers, but by individual (and groups of) broadcast stations and by overbuilders as well, to say nothing of broadcast networks and cable networks.<sup>36</sup> Competition among all of these program outlets is real, and competitive alternatives are well established.<sup>37</sup>

For purposes of determining whether the horizontal growth of cable operators must be constrained in order to prevent impediments to the flow of programming to consumers, there is no need for the Commission to distinguish between the market for program “aggregation” (Market 2) and the market for program “distribution” (Market 3). The *Further Notice* correctly observes that, from many standpoints – such as advertisers

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<sup>36</sup> Buyers of video programming include broadcasters (both through networks and syndication), cable, wireless, and satellite distributors, and could include Internet streaming or other technologies. See FNPRM at ¶¶ 8, n.38, 10. See also FNPRM at ¶ 19 (discussing SMATV, MMDS, and DBS). The term “cable networks” as used here is something of a misnomer, for the vast majority of these networks are now delivered over DBS (and OVS) as well as by cable.

<sup>37</sup> This analysis does not attempt to include the massive global market – including both the English-and non-English-speaking worlds, for video programming, which provide vast additional opportunities for program creators.

or equipment suppliers – there are distinct markets for (1) program production;<sup>38</sup> (2) program packaging;<sup>39</sup> and (3) programming distribution.<sup>40</sup> Yet, from the perspective of the consumer, the packaging and distribution markets generally collapse into a single market (generally referred to herein as “program outlets”). For viewers seeking access to video programming, it does not matter whether that video programming (Market 1) obtains carriage on a broadcast network or cable network (Market 2) or a broadcast station, DBS system, or cable system (Market 3), so long as the flow of video programming to viewers is not unfairly impeded. After all, consumers watch programs, they don’t watch aggregators or distributors.

For these reasons, in setting *horizontal* ownership limitations, there is no basis for the Commission to distinguish between the ability of a producer of video programming to sell that programming to a program packager and its ability to sell to a program distributor. Both outlets are potential purchasers of programming; both can convey that programming to consumers. The difference between one and the other matters only if the Commission seeks to guarantee success for an individual producer of video programming (a participant in Market 1) or to re-distribute profits among the middlemen (participants in Markets 2 and 3) – neither of which objective is authorized or contemplated by the statute. The Commission’s objective should be to prevent unfair impediments in the flow of video programming to consumers, not to benefit any specific market participant.<sup>41</sup>

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<sup>38</sup> See FNPRM at ¶ 9.

<sup>39</sup> See FNPRM at ¶¶ 10-17. The relevant geographic market here “can be regional, national, or even global in scope depending on the nature of the programming under consideration.” *Id.* at ¶ 12.

<sup>40</sup> See FNPRM at ¶ 18.

<sup>41</sup> The Commission has made plain that it does not concern itself with the allocation of profits among industry interests. See Primetime Access Rule, Report and Order, 11 FCC Rcd 546, 555 ¶ 18 (1995) (what matters is the extent to which a rule will serve the public interest and “maximize consumer welfare,” not “merely protec[t] individual competitors”). See also Evaluation of the Syndication and Financial Interest Rules,

Consumers' interests in this regard are amply served today. Because of the current structure of the market for program distribution, no cable operator could, simply as a consequence of the number of homes it served, unfairly impede the flow of video programming to the consumer.<sup>42</sup> Forces beyond the influence of cable operators prevent any such impediment.

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Second Report and Order, 8 FCC Rcd 3282, 3302 ¶ 42 (1993) ("altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission"); Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Memorandum Opinion and Order, 4 FCC Rcd 2711, 2723 ¶ 66 (1989) (the Commission's goal is "of course, to see that the public interest is served, not to maintain an efficient distribution scheme that favors [certain competitors]") (emphasis in original); Evaluation of the Syndication and Financial Interest Rules, Memorandum Opinion and Order, 73 RR 2d 1452, 1454 ¶ 39 n.52 (1993) (the Commission "seeks to insure that the market as a whole functions competitively, which will maximize the overall diversity of program sources and result in the best service to the public . . . not to alter the distribution of profits among private parties").

<sup>42</sup> As the Court put it, "[i]f an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch." Time Warner II, 240 F.3d at 1134. There is dramatic and incontrovertible marketplace evidence that consumers do in fact change MVPDs (but virtually no evidence that "an MVPD refuses to offer new programming"). What is more important is that, thanks to competition, consumers have the opportunity to switch if they choose.

This alone makes it unnecessary to consider the potential for collusive behavior by cable operators. There is no evidence that collusive behavior by cable companies has in fact unfairly impeded the flow of video programming to consumers. Accord Time Warner II, 240 F.3d at 1132 (noting the absence of "record support for inferring a non-conjectural risk of collusive behavior") (emphasis supplied). Nor is it likely that cable companies would have the incentive to act jointly in this manner, since doing so would not materially enhance any given cable operator's ability to raise prices or reduce output in any of its local markets. Nevertheless, were the Commission to seek limits on these grounds, it would have to demonstrate why these rules are necessary "despite the existence of the antitrust laws and other behavioral prohibitions" enacted as part of the 1992 Act. Id. at 1133-34.

1. Direct Broadcast Satellite Companies Are Now Full-Fledged Competitors to Cable.

The single biggest change affecting the flow of video programming since 1992 is the emergence – and maturation – of robust competition among MVPDs. For multichannel video services, few consumers had an alternative to cable in 1992. Now, the vast majority of consumers (as well as creators of programming) have access – at a minimum – not only to a cable system but also to two facilities-based, all-digital satellite competitors with nationwide reach. This, of course, is in addition to consumers' access to multiple over-the-air broadcast stations and, as digital TV propagates, to many more such signals.

In 1992, there was no DBS service at all. Today, DirecTV serves more than ten million subscribers, and EchoStar serves more than six million.<sup>43</sup> Some analysts predict that the number of homes equipped with satellite dishes will reach twenty-five million by 2005.<sup>44</sup>

These changes are directly reflected in cable's share of the MVPD market. Cable's market share has dropped in each and every one of the Commission's annual Video Competition Reports and is still declining.<sup>45</sup> DBS growth continues to be exceedingly robust. From 1999 to 2000, DBS subscribership grew at a rate of over twenty-eight percent compared to 1.5 percent for cable.<sup>46</sup>

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<sup>43</sup> DirecTV now has more subscribers nationwide than all but two cable operators, AT&T and AOL Time Warner, while only five cable companies have more customers than the Dish Network. Currently, DirecTV serves 10.5 million subscribers; EchoStar serves 6.5 million. See [http://skyreport.com/dth\\_us.htm](http://skyreport.com/dth_us.htm) (viewed 12/14/01).

<sup>44</sup> Seth Goldstein, Study Says DBS Will Expand, But It Won't Hurt VHS or DVD, Video Store, September 24, 2000.

<sup>45</sup> See NCTA, Cable and Telecommunications Industry Overview 2001, available at <http://www.ncta.com>, at 14 (Dec. 11, 2001) ("NCTA 2001 Overview").

<sup>46</sup> See Seventh Annual Video Competition Report, 16 FCC Rcd at 6125 Table C-1. See also ITV Keeps Pushing DBS Ahead of Cable, Satellite News, August 13, 2001 (projecting double-digit compounded annual growth rates for DBS through 2006).

The Commission now recognizes that DBS currently offers “an effective alternative path through which program networks can reach subscribers.”<sup>47</sup> There is ample evidence to support this conclusion. DirecTV and EchoStar each operate multiple full-CONUS orbital satellites capable of reaching the vast majority of consumers nationwide.<sup>48</sup> They each provide customers with over two hundred digital channels.<sup>49</sup> They have access to the vast majority of key video programming services.<sup>50</sup> They can and do take the initiative to launch new programming services before they are available to cable subscribers.<sup>51</sup>

Moreover, thanks to recent legislative intervention that was intended to, and did, remove their one significant competitive disadvantage vis-à-vis cable, DBS companies

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<sup>47</sup> FNPRM at ¶ 22. See also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Report on Cable Industry Prices, 16 FCC Rcd 4346, 4364 ¶ 52 (2001) (“Our finding suggests that DBS is a substitute for cable services”); FCC Touts Cable Rivals, Television Digest, June 25, 2001 (DBS is competing fiercely with cable); DirecTV Press Release, “DIRECTV Expands Washington, D.C. Local Broadcast Channel Package; Additional Local Channels Now Available to Washington, D.C. Customers,” Dec. 27, 2001 (DirecTV President and COO claims company offers “true cable replacement”).

<sup>48</sup> See Comments of DirecTV, Inc., CS Docket No. 00-132, Exhibit A (Sept. 8, 2000); Richard R. Peterson, Satellite Television: A Consumer’s Guide, at 10 (July 20, 2000) (available at [www.dbsforums.com/dbs/a0.htm](http://www.dbsforums.com/dbs/a0.htm)).

<sup>49</sup> See id.; see also Satellite Broadcasting and Comm. Asso. v. FCC, No 01-1151, at 10 (CA 4, Dec. 7, 2001) (EchoStar and DirecTV “each have the ability to carry between 450 and 500 channels via full CONUS satellites”).

<sup>50</sup> See 47 U.S.C. § 548; 47 C.F.R. 76.1000 et seq.

<sup>51</sup> DirecTV claims that “[m]ore than a dozen programming channels have been launched on DirecTV” and “more are on the way.” Comments of DirecTV, Inc., CS Docket No. 01-290, at 6 (Dec. 3, 2001). EchoStar is planning to offer new programming from Vivendi’s television and movie studios. See Seth Schiesel and Rick Lyman, Hollywood’s New Force: The Overview, New York Times, Dec. 15, 2001, at A1 (Vivendi will place five channels of its programming on EchoStar satellites); Amy Hardon and Jennifer Lee, Deal Bolsters Satellites as Cable TV Competitors, New York Times, Dec. 17, 2001, at A16 (article also characterizes transaction as “latest sign” that DBS companies are “potent competitors to cable operators for delivering video programming”).

now can and do carry local broadcast signals.<sup>52</sup> They also deliver high-speed Internet services to consumers.<sup>53</sup> Finally, their marginal costs are minimal, since virtually all the expenses of constructing, launching, and operating full-CONUS satellites are fixed. Separately or in combination,<sup>54</sup> DBS providers clearly impose an effective and responsive check on cable companies' behavior in the MVPD marketplace.<sup>55</sup>

Although many initially believed that DBS held the potential to thrive only in areas not served by cable, the reality today is clearly otherwise. At least half of all new DBS subscribers are switching to DBS from cable.<sup>56</sup> Moreover, the median cost of a DBS system, including installation, fell to \$150 in 2000 from \$300 in 1998, while

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<sup>52</sup> See Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999) ("SHVIA")(codified at 47 U.S.C. § 338, "Carriage of Local Television Signals by Satellite Carrier").

<sup>53</sup> See Seventh Annual Video Competition Report, 16 FCC Rcd at 6042 ¶ 77; DirecPC website, <http://www.direcpc.com/index2.html> (viewed Dec. 15, 2001) ("DirecPC delivers a whole new Internet to your home at raging speeds. If you can see the sky, your Internet can scream"); Communications Daily, at 2, Dec. 4, 2001 (DirecTV Broadband extends special offers to cable modem customers); see also Andy Pasztor, EchoStar's Chairman Confounds Industry with Plans for Combination with Hughes, Wall Street Journal, Dec. 27, 2001, at A3 (reporting plans by Charles Ergen "to invest at least \$1 billion to expand and reshape Hughes's Spaceway project, designed to provide high-speed Internet connections via satellite").

<sup>54</sup> Comcast does not offer an opinion as to how the Commission should deal with the proposed merger of DirecTV and EchoStar. Presumably, however, neither the Commission nor the Department of Justice would approve the merger if either agency believed the creation of a single national DBS provider (larger than any existing cable company) would substantially reduce competition. In no circumstance could the Commission properly restrict the growth of cable companies merely to mitigate any harms that may result from permitting consolidation of the two major DBS providers.

<sup>55</sup> And vice versa. For example, if a DBS provider refuses to carry a video programming channel, see, e.g., Linda Moss, Ergen Threatens to Drop Networks, Multichannel News, Dec. 17, 2001, and consumers do not support the decision that provider has made, they have the option to switch their MVPD business to a cable operator (or an overbuilder, or the other DBS company).

<sup>56</sup> See Comments of DirecTV, CS Docket No. 01-129, at 11 (Aug. 3, 2001).

subscription fees held fairly steady at about \$40 a month.<sup>57</sup> DBS's growth is expected to continue to be robust.<sup>58</sup>

2. Cable Faces Other Facilities-Based Competitors in Delivering Video Programming to Consumers.

Comcast also faces competition from what used to be called "overbuilders" and may now be more accurately characterized as competing broadband service providers. Thanks to technological "convergence," the Telecommunications Act of 1996, and a plan to provide "full-service" packages of voice, video, and data services, overbuilders like RCN, Everest, WideOpenWest, and a dozen other providers are now challenging cable operators with a second broadband wire down Main Street.<sup>59</sup>

As Comcast discussed at greater length in the Commission's annual video competition proceeding, RCN<sup>60</sup> currently competes with Comcast in the Washington, DC,<sup>61</sup> and Philadelphia markets.<sup>62</sup> Knology is competing with Comcast in Charleston,

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<sup>57</sup> Seth Goldstein, Study Says DBS Will Expand, But It Won't Hurt VHS or DVD, Video Store, September 24, 2000. Promotional offers frequently include free equipment and free installation.

<sup>58</sup> Id. See also ITV Keeps Pushing DBS Ahead of Cable, Satellite News, August 13, 2001 (DBS is still posting solid numbers, with net new subscribers reaching an estimated 3.1 million by the end of 2001).

<sup>59</sup> See Cable's State Is One of Rapid Change, Multichannel News, Nov. 20, 2000.

<sup>60</sup> RCN, the country's largest OVS operator (and also a traditional Title VI franchised cable company), now passes 1.6 million homes with major clusters in the New York, Philadelphia, Boston, Washington, D.C., Chicago, San Francisco, and Los Angeles markets. John M. Higgins and Gerard Flynn, Cable Slows, DBS Sprints, Broadcasting & Cable, June 4, 2001. RCN has raised over \$5.3 billion and, as of September 30, 2001, had \$1.2 billion in liquidity. See RCN Company Profile, available at <http://www.rcn.com/investor/index.html> (viewed Dec. 15, 2001).

<sup>61</sup> RCN is currently providing OVS service under the Starpower name in Washington, DC, and Gaithersburg, MD. RCN has been awarded cable franchises in Arlington County, VA and Montgomery County, MD, and is in negotiations in Alexandria, VA, Reston (Fairfax County), VA, and Baltimore County, MD. See <http://www.starpower.net/news/11-00/11-22-2000.html>.

<sup>62</sup> RCN has agreements to serve 20 communities around Philadelphia, PA and Union, NJ. Although RCN has cut back plans to expand into certain new markets for financial

SC, Panama City, FL, Huntsville, AL, Knoxville, TN, and August, GA.<sup>63</sup> Broadband Connect has obtained OVS franchises in 30 Maryland communities in the Baltimore and Washington region. In Michigan and Indiana, Wide Open West competes with Comcast using cable assets purchased from Ameritech. Elsewhere, Comcast's broadband competitors include Western Integrated Networks, Everest Communications, Carolina Broadband, and Grande Communications.<sup>64</sup>

3. There Are Countless Other Cable-Independent Outlets for Video Programming To Reach Consumers.

There are numerous other avenues – legally and functionally independent of cable – by which video programming is delivered to viewers, further eroding the incentive or ability of any single cable company to constrain the video programming choices available to consumers. To begin with, some of the most prolific distributors of video programming are broadcast television stations and the networks and syndicators from which they obtain programming.<sup>65</sup> Subject to specified capacity limitations,<sup>66</sup> every local

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reasons, in its existing markets RCN continues to compete vigorously. See, e.g., Matt Stump, RCN Adds VOD in Comcast Backyard, Multichannel News, Dec. 13, 2001.

<sup>63</sup> Despite the past year's economic downturn, Knology, Inc. experienced record growth and reported its strongest results ever. See Tony Adams, West Point, GA Based Cable, Internet Company Gains Customers Quickly, Columbus (GA) Ledger-Enquirer, August 3, 2001.

<sup>64</sup> Mike Farrell, Overbuilder Sounds Confident, but Wary, Multichannel News, February 5, 2001. See also Joe Estrella, Overbuilding Gears for Denver Launch, Multichannel News, March 19, 2001 (discussing WideOpen West LLC).

<sup>65</sup> The Commission itself recognizes that "over-the-air broadcast networks are also purchasers of programming content." FNPRM at ¶ 10. In fact, it notes that "over-the-air broadcast networks . . . compete with MVPDs for advertising revenue [and are] carried as content on MVPD systems." FNPRM at ¶ 10. Congress defines video programming in terms of what broadcasters do: "The term video programming means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). Although broadcasters have been heard to complain that they have only a "single revenue stream," their ability to create and purchase programming is secured by substantial advertising revenues; in 1999, the seven broadcast networks realized more than twice the advertising revenues of all cable

broadcast station enjoys a right of compulsory carriage on the cable systems in its service areas under the must-carry rules.<sup>67</sup> As a result, ABC, NBC, CBS, Fox, WB, UPN, and PBS enjoy ubiquitous cable carriage – without any editorial oversight by any cable operator.

Through their affiliates' ability to invoke statutory must-carry rights, these broadcast networks now have a *guaranteed* outlet for video programming on the very cable systems at issue here, thereby ensuring that no cable company could impair the ability of a producer of video programming to access viewers through broadcast stations or their provider networks or to negatively impact the content that is produced.<sup>68</sup> Much of that programming also enjoys a "second life" through syndication, which remains a huge market. Syndication of first-run programming (e.g., *Oprah*) is itself another major pathway through which programming can be "aggregated" (in a sense) and then marketed

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networks combined (\$18 billion versus \$8.3 billion). Seventh Annual Video Competition Report, 16 FCC Rcd at 6050 ¶ 98. And, of course, by leveraging retransmission consent, broadcasters do in fact secure additional revenue streams.

<sup>66</sup> A cable operator that has "12 or fewer usable activated channels" need only carry three local commercial television stations. 47 U.S.C. § 534(b)(1)(A). Others need not devote more than one-third of the "aggregate number of usable activated channels" for must-carry signals. 47 U.S.C. § 534(b)(1)(B).

<sup>67</sup> 47 U.S.C. § 534, "Carriage of Local Commercial Television Signals." The Commission recognizes that, "[b]ecause of must carry regulations, in fact, content that is carried on over-the-air broadcast networks is generally guaranteed carriage on cable systems." FNPRM at ¶ 10 (emphasis supplied).

<sup>68</sup> With the passage of Satellite Home Viewer Improvement Act, they also have de facto guaranteed outlets on DBS operators' systems as well. See 113 Stat. 1501, 1501A-526 to 1501A-545 (requiring satellite carriers, by January 1, 2002, "to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal," subject to the other carriage provisions contained in the Act).

to broadcast stations, where – again – must-carry ensures its availability to cable viewers.<sup>69</sup>

Moreover, each of the major commercial broadcast television networks is now owned by a media company that has interests in multiple cable networks. ABC, NBC, CBS and Fox each have multiple outlets for their programming. In addition to ABC, Disney offers video programming outlets through ABC Family, the Disney Channel, ESPN, ESPN2, ESPN Classic, ESPNNews, Lifetime, LMN, SoapNet, and Toon Disney.<sup>70</sup> NBC has CNBC and MSNBC.<sup>71</sup> In addition to CBS and UPN, Viacom provides outlets for video programming through BET, BET on Jazz, CMT, Comedy Central, Flix, MTV, Nickelodeon, Showtime, TMC, TNN, TV Land, and VH1.<sup>72</sup> Fox also offers video programming through FMC, Fox News, Fox Sports Net, FX, and National Geographic.<sup>73</sup>

In combination, the leverage conferred by retransmission consent negotiation plus the actual or potential consumer demand for these channels generally ensures widespread distribution, and strictly limits the ability of a cable operator to interfere unfairly with consumer choice. Thus, any danger of unfair impediments to the flow of video programming is nonexistent.

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<sup>69</sup> At any given time, thousands of programs are marketed through syndication channels by hundreds of individual syndicators. See Special Report: NATPE 2001, Broadcasting & Cable, Jan. 2001, at 26. In a typical week, approximately eight syndicated shows have audiences of more than 5 million and another dozen or more have audiences above 3 million. See Syndication Watch, Broadcasting & Cable, Nov. 19, 2001. By contrast, on advertising-supported cable networks, no regularly scheduled shows amass audiences as large as 3 million; only a few movies and certain professional sporting events achieve such numbers. See Viewership Counts for Top Cable Networks, Broadcasting & Cable, Nov. 19, 2001, at 18-20.

<sup>70</sup> See Kagan Media, “Cable Program Investor” at 4, Sept. 11, 2001.

<sup>71</sup> Id.

<sup>72</sup> Id. Viacom also has an additional digital “suite” that includes multiple channels of Nickelodeon, MTV, and VH1.

<sup>73</sup> Id. Fox also has at least 18 regional sports networks, including 7 of the top 10. Regional Sports Network Census, Media Sports Business, May 31, 2001, at 3.

Every one of these networks – and dozens more that are independent of cable operator control – represents a potential outlet for a program seeking access to viewers. All of them demonstrably have the capacity to reach sufficient viewers to support nascent programs, unconstrained by any cable operator’s decisionmaking. Collectively, they ensure that creators of programming have all that they can reasonably ask: a “fair opportunity to succeed.”

4.     Digital Broadcasting Will Provide Thousands of Additional Outlets for Video Programming.

The advent of digital television (“DTV”) broadcasting will create thousands of new outlets for video programming to reach viewers and thereby further enhance the abundance and competitive supply of programming. Every broadcaster has been “loaned” an additional six MHz of spectrum for use in digital broadcasting.<sup>74</sup> Each six MHz can be used for multiple “channels” of video programming, and each such channel can support one hundred sixty eight hours per week (24x7) of standard-definition video programming streams.<sup>75</sup>

Although these additional channels are not – and should not be – guaranteed cable carriage,<sup>76</sup> they will be available to almost every U.S. television household. Indeed,

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<sup>74</sup> More than two hundred broadcasters are already transmitting DTV broadcasts, and over one thousand more are scheduled to be operational in 2002.

<sup>75</sup> See “Digital Television Consumer Information,” FCC Office of Engineering and Technology Release, November, 1998 (available at [http://www.FCC.gov/bureaus/engineering\\_technology](http://www.FCC.gov/bureaus/engineering_technology)).

<sup>76</sup> 47 U.S.C. § 534(b)(3), “Content To Be Carried” (requiring cable operators to carry only the “primary” video and accompanying audio signal of local broadcast networks). The Commission has determined that, after the conversion from analog to digital is complete, and the digital signal becomes eligible for must-carry rights, DTV broadcasters must dedicate one of the “streams” transmitted over their “channel” as the “primary” stream for must-carry purposes. Carriage of Digital Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2623 ¶ 57 (2001). Broadcasters will likely use retransmission consent negotiations as leverage to secure carriage of their “non-primary” program streams.

given their ability to offer multiple channels of programming by harnessing the flexibility of the DTV bit stream, each local broadcaster is empowered to become a mini-MVPD all by itself. By combining or coordinating their efforts, local broadcasters have the opportunity to create a platform that offers potentially dozens of channels directly to viewers, using the public airwaves.<sup>77</sup> None of the video programming decisions made by these broadcasters will be subject to the influence of any cable company, whatever its horizontal scale; on the contrary, these outlets will be dominated by the broadcast networks described above.

**B. Increased Cable Channel Capacity Also Means More Consumer Choices and No Possibility of Any “Unfair” Impediment to the Flow of Video Programming.**

Competition invariably spurs innovation, and the competition from DBS providers with 200-plus channels has impelled cable operators to accelerate upgrades and capacity expansion of cable systems. The striking increase in channel capacity on most cable systems – and for Comcast in particular – increases further the opportunity for video programming to reach consumers.<sup>78</sup>

Even focusing solely on analog channels, capacity has increased substantially. When the 1992 Cable Act was passed, a typical cable operator offered 36 channels.<sup>79</sup> Today, operators typically offer eighty analog channels.<sup>80</sup> The number of cable

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Comcast has presented detailed comments in CS Docket No. 98-120 explaining why the Commission cannot properly expand the must-carry rights of broadcasters.

<sup>77</sup> See Ted Hearn, Ergen: Cable Licking Their Chops, Multichannel News, Nov. 7, 2001 (quoting EchoStar Chairman as saying that broadcasters “want to be in the subscription television business” and to provide “200 channels competing with Dish Network”).

<sup>78</sup> The Commission recognizes the importance of the increase in the number of channels available on MVPDs from 1992 through 2000. FNPRM at ¶¶ 25, 41.

<sup>79</sup> 1992 Senate Report at 3, 1992 U.S.C.A.A.N. at 1135.

<sup>80</sup> See FNPRM at ¶ 25; Seventh Annual Video Competition Report, 16 FCC Rcd at 6038 ¶ 21; see id. at Table B-4 (68% of systems exceed 54 channels).

subscribers receiving more than fifty channels has doubled since 1993, while the number of cable systems with fewer than thirty channels has dropped almost by half since 1993.<sup>81</sup>

These dramatic gains are modest in comparison to the expansion that is now occurring as a result of cable plant upgrades and the introduction of digital video offerings. Since 1996, Comcast has invested five billion dollars upgrading its plant,<sup>82</sup> and has now completed upgrades serving a full 95% of its subscribers.<sup>83</sup> The cable industry as a whole has invested more than \$55 billion.<sup>84</sup>

One of the main results of these upgrades is the ability to offer digital video programming. Typically, digital packages offer customers an additional forty to sixty conventional programming channels. Digital customers also receive significantly more premium channels. Instead of a single HBO channel, for example, they get seven or more; so, too, can they receive multiple channels of Showtime, Encore, the Movie Channel, and similar services. Digital customers also have a larger number of pay-per-view (“PPV”) offerings, in some cases up to 99 channels. More than 97 percent of Comcast’s customers have these packages available to them, and they typically include more than 200 video programming channels.

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<sup>81</sup> Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd 2060, at B-2 (1995), with Seventh Annual Video Competition Report, 16 FCC Rcd at 6105.

<sup>82</sup> Upgrading plant is a high priority for Comcast. See “Comcast Reports Strong Third Quarter Results,” press release October 31, 2001 (available at <http://www.cmcsk.com>).

<sup>83</sup> Comcast would be even further along in the upgrade process but for various recent “swaps” where it has relinquished upgraded systems in exchange for ones that have not yet been upgraded. The biggest Comcast systems that have not yet been upgraded are those in Baltimore, Maryland, and Washington, D.C., both of which were acquired in the past 12 months. Rebuilds are progressing rapidly in both systems. The first part of the upgrade in Washington – that in Anacostia – will be completed shortly.

<sup>84</sup> See NCTA 2001 Overview, supra note 45, at 1.

The trend towards increased capacity is ongoing and irreversible. Inevitably, this means that the video programming choices available to consumers are expanding enormously and that new programs have unparalleled opportunities to find an audience through cable.<sup>85</sup> During the period from 1992 to 2000, the number of cable networks has increased from 68 to 281 and the percentage of networks that are vertically integrated with cable operators has declined from 57% to 35%.<sup>86</sup>

Still more options will be made available through video-on-demand (“VOD”). Comcast has recently rolled this service out to about two million customers, a number that will grow dramatically in 2002. These customers can now choose from a wide array of new and classic movies and other programming at almost any time of the day or night. Comcast is also experimenting with subscription VOD offerings through which customers can obtain immediate access to previously shown episodes of current programs. Over time, the library of VOD titles will inevitably grow. Again, the result is greater abundance of viewing choices.

**C. Emerging Marketplace Trends Will Further Attenuate Any Ability of Cable Operators To Restrict Viewers’ Access to Video Programming.**

The Commission is fully aware that the future promises still more change, and even more profound consumer empowerment. Telephone companies have built a massive infrastructure that passes virtually every home and business in America. Several large telephone companies each serve far more customers than even the largest cable

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<sup>85</sup> See New Nets Squeeze into Consolidated Market, Multichannel News, Nov. 26, 2001, at 1, 60, 64, 68, 70, 72 (discussion by several very different programmers confirms that pivotal factor is quality of the programming idea and its attractiveness to consumers; MVPDs are looking for new programs “to drive their businesses; otherwise, those distribution chains can’t be maximized in terms of value”; representatives of The Tennis Channel, BET, and Rainbow all see some potential benefit to programmers of MVPD consolidation).

<sup>86</sup> See Comments of Comcast Corp, CS Docket No. 01-290, at 7 (with citations) (Dec. 3, 2001).

company.<sup>87</sup> As fiber is built further out into local distribution networks, and the length of copper loops is correspondingly shortened, the telephone plant becomes increasingly suitable for video programming distribution. Given the rate of telephone line upgrades, the RBOCs may soon administer an integrated broadband physical plant similar to that of cable.<sup>88</sup>

It is also clear that, as broadband deployment moves forward, the availability of streaming video over the Internet will increase due to consumer demand. No matter who supplies broadband Internet access, the availability of Internet video could not be limited by those suppliers.<sup>89</sup> Internet providers have every incentive to provide their customers with content that is valued, not to steer consumers to options that detract from the value of the service. And, in any event, consumers can procure high-speed Internet services from multiple sources – including DSL, satellite, cable and terrestrial wireless.

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<sup>87</sup> Verizon and SBC both have over 60 million network (switched) access lines. FCC, Statistics of Communications Common Carriers, 2000-2001 Edition, at 3 (statistics as of Dec. 31, 2000). No cable company currently has even 20 million customers. Telephone companies have the additional advantage of serving vast numbers of business customers, in contrast to the primarily residential focus of cable operators. As a result, SBC's annual revenues exceed \$50 billion, and Verizon's exceed \$60 billion, id., which is vastly more than those of (e.g.) AT&T Broadband and Comcast combined (\$18 billion).

<sup>88</sup> This has already begun. In Phoenix, Omaha, and Denver, Qwest now uses VDSL technology to offer Qwest Choice TV and Online, which the company describes as “an innovative alternative to cable or satellite service, with the latest in video entertainment, high-speed Internet access, and integrated telephony features.” See Qwest Choice TV & Online VDSL Technology, available at <http://www.qwest.com/vdsl/index.html> (viewed Jan. 4, 2001). The video package is “100% digital” and “includes more than 250 channels.” Id. See generally Robert S. Metzger and Benjamin P. Broderick, Communications Convergence, *The Computer Lawyer*, October, 2001 (“The integration of last-mile fiber solutions with the local telecommunications infrastructure will be facilitated by several recent industry developments”); *Internet Daily*, at 6 (Nov. 20, 2001) (International Telecommunications Union adopts two new global standards relating to Passive Optical Networks; will enable delivery of TV channels).

<sup>89</sup> Limitations imposed as a result of bandwidth scarcity will be susceptible to market pressures as bandwidth becomes more available.

Meanwhile, new technologies and innovations are expanding the boundaries of “time” available to viewers. Personal Video Recorders (“PVRs”) and Video on Demand (“VOD”) enable consumers to choose and assemble program “packages” consisting of individual programs transmitted at all hours of the day or night and saved on a hard drive.<sup>90</sup>

**IV. A HORIZONTAL OWNERSHIP CAP WOULD JEOPARDIZE EFFICIENCIES IMPORTANT TO INVESTMENT AND INNOVATION IN BOTH VIDEO AND OTHER SERVICES.**

Congress instructed the Commission in considering ownership rules to take account of the dynamic nature of the communications marketplace.<sup>91</sup> Innovation is an essential aspect of a dynamic marketplace. With the clear approval and encouragement of Congress and the Commission, the cable business itself has moved far beyond just transmitting video programming.<sup>92</sup>

Over time, Comcast has invested and transformed itself into a broadband service provider. Consistent with the 1996 Act (and the Commission’s implementation of that legislation), Comcast is providing a wide range of new services – digital cable, high-speed Internet service, and now video-on-demand – to consumers. More new services are on the horizon, such as voice-enhanced data service and IP telephony, interactive television, and home networking. Any forward-looking rules must recognize that cable has greatly expanded both its channel capacity and the uses to which that capacity can be put.

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<sup>90</sup> Some observers believe that PVRs are further enhancing the competitiveness of DBS vis-à-vis cable. ITV Keeps Pushing DBS Ahead of Cable, Satellite News, August 13, 2001.

<sup>91</sup> See 47 U.S.C. § 533(f)(2)(G).

<sup>92</sup> The 1992 Act also sought to “ensure that cable operators continue to expand, where economically justified, their capacity.” 1992 Act, § 2(b)(3), 106 Stat. at 1463. See also Time Warner II, 240 F.3d at 1136.

Congress clearly intended the Commission to promote the ability of cable to compete in markets – such as telephony, high-speed Internet, and home safety and security – outside of video.<sup>93</sup> There are obvious efficiencies of scale and scope associated with the investments and technical knowledge necessary to transform a cable system into a complete broadband service provider. Congress also understood that increased ownership could create beneficial efficiencies.<sup>94</sup>

Comcast has benefited from economies of scale and scope in moving from its role as a video delivery service to its current status as a comprehensive broadband provider.<sup>95</sup> Owning multiple cable systems (and serving many cable subscribers) is one key to being able to upgrade and introduce new services at a reasonable cost per subscriber. Therefore, in assessing the need for horizontal ownership rules, the Commission must be mindful of the effect of such limitations on cable companies' ability to invest, innovate and compete both in traditional and in new lines of business.

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<sup>93</sup> This intention has been the law since the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2780, Oct. 30, 1984, codified at 47 U.S.C. § 521 et seq. ("1984 Act"). The expressed purpose of the 1984 Act is, in part, to ensure "that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521. To the same effect, the 1996 Telecommunications Act was intended, in part, to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, February 8, 1996. Chairman Powell has also noted that "competition policy must take account of our broadband deployment goals . . . ." Michael Powell, Remarks at the National Summit on Broadband Development (October 25, 2000).

<sup>94</sup> 47 U.S.C. § 533(f)(2)(D). The Commission has also recognized this in other contexts. See, e.g., Seventh Annual Video Competition Report, 16 FCC Rcd at 6070 ¶ 153 (recounting commenters' listing of numerous economies of scale and scope); cf. SBC/Ameritech Merger Order, 14 FCC Rcd 14712, 14847 ¶ 326 (acknowledging economies of scale).

<sup>95</sup> Comcast expects to present detailed information concerning economies of scale and scope in the broadband business as part of the application alluded to in note 2, supra.

## **CONCLUSION**

The sole congressionally authorized purpose of this proceeding is to determine whether there is any demonstrable current need to impose a cap on cable operators' size in order to prevent unfair impediments to the flow of video programming to consumers. Neither conjecture, nor risks that have dissipated since 1992, are relevant to this inquiry.

Today, competition, investment, and innovation ensure consumer access to a wide range of video programming choices. Today, no one cable operator can act as a bottleneck.

Any one of seven broadcast networks can deliver video programming to consumers, without any interference from a cable operator. Likewise with multiple "must-have" cable networks. Two national DBS competitors and numerous cable overbuilders provide independent distribution platforms. Meanwhile, digital broadcast television, the Internet, and new in-home consumer technologies and services are making it even easier for viewers to access an abundance of video programming.

Comcast respectfully urges that the Commission (1) focus on the extraordinary breadth of opportunities for video programming to reach an audience, (2) consider whether any demonstrable impediments to the flow of video programming require the imposition of horizontal ownership limits, and (3) preserve the ability of cable operators to compete against other players with massive national and regional footprints in providing a growing array of facilities-based, broadband services. Comcast trusts that these principles will enable the Commission to fulfill its statutory responsibility and remain faithful to judicial mandates.

**Comments of Comcast Corporation  
CS Docket No. 98-82  
January 4, 2002**

Respectfully Submitted,

COMCAST CORPORATION

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